82-1227

Supreme Court, U.S.
FILED
JAN 21 1983
ALEXANDER L. STEVAS
CLERK

No.....

SUPREME COURT OF THE UNITED STATES

October Term, 1982

KENNETH FORBES, PETITIONER

versus

ROBERT C. NEWMAN, II , RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED

1. In states which have the so-called compulsory "report-a-crime statute", do the physicians and psychotherapists who are mandated to report their patients to authorities, become agents of the state as did the court appointed physician in Estelle v. Smith, 451 U.S. 454 (1981)?

2. In states which have the so-called compulsory "report-a-crime statute" (applicable to physicians and psychotherapists), is the patient constitutionally entitled to be warned in advance by the physician or therapist, (1) that any disclosures relating to the "report-a-crime statute" will result in the patient being reported to the authorities, and (2) to a further warning that the patient may be subject to criminal and civil penalties?

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Section 2918, California Business and Professions Code. 3

OPINIONS BELOW

The Opinion of the Court of Appeal for San Bernardino County, State of California was entered on August 16, 1982, and it held that the Petitioner was not entitled to be warned about self-incrimination. The unpublished Opinion of the Court of Appeal is set forth in the Appendix hereto. A Petition for Hearing before the California State Supreme Court was filed on September 20, 1982 and denied without opinion on October 27, 1982.

JURISDICTION

The Judgment of the Supreme Court of the State of California was dated and entered on October 27, 1982. The jurisdiction of the United States Supreme Court is invoked under the provisions of 28 U.S. C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment V

No person shall be ... compelled, in any criminal case, to be a witness against himself....

Section 11166, California Penal Code - mandates that practitioners report their patients to authorities upon suspicion of specified criminal activities.

(Pertinent text set forth in the Appendix at page A20.)

Section 11172, California Penal Code - grants immunity to practitioners for reporting their patients and imposes criminal penalty upon practitioners who fail to so report their patients.

(Full text set forth in the Appendix at page A21.)

STATEMENT OF THIS CASE

In March, 1979, appellant, Kenneth Forbes, (hereinafter "Forbes") engaged the fiduciary and confidential services[1] of Respondent, Robert C. Newman, II, (hereinafter "Newman") as a psychological therapist and counselor. During the course of the therapy, Forbes made a certain confidential disclosure to Newman concerning an embarrassing situation which was accidentally observed by his minor daughter who inadvertently entered a closed room while Forbes, who was alone, was engaged in a private sex act. Immediately thereafter, Newman wrote a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services reporting this incident as a "vague sexual contact" with his daughter.[2] As a result

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1/California Business and Professions Code Section 2918 states: "The confidential relations and communications between psychologist and client shall be privileged as provided by Article 7 (commencing with Section 1010) of Chapter 4 of Division 8 of the Evidence Code."

2/Said report was mandated by Section 11166 of the California Penal Code which is set out in Appendix at page A20.

of the reported "vague sexual contact" Forbes was later tried and acquitted on criminal charges allegedly related to this incident.[2A/] However, his children were taken away from him by the County for a period of nine months thereafter.

On or about November 10, 1980, Forbes filed a civil complaint against Newman charging him with negligent conduct in reporting Forbes to the authorities; for failing to warn Forbes that anything said by him relating to child abuse would be reported to the authorities; and for failing to warn him that any such report could result in criminal or civil prosecution. In addition, Forbes claimed violation of his constitutional rights. Thereafter the Superior Court sustained a demurrer to the entire Complaint without leave to amend. Forbes appealed, and the Court of Appeal reversed as to the actions based on negligent reporting, but affirmed that there was no constitutional grounds requiring Newman

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2A/ California Penal Code Section 273a provides

to warn Forbes about the "report-a-crime statute".

Thereafter Forbes applied to the California State Supreme Court for review only upon that portion of the opinion of the Court of Appeal which held that Forbes was not constitutionally entitled to be warned by his therapist about the "report-a-crime statute". This application was denied without opinion on October 27, 1982.

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(Fn. 2A/ con't)
for criminal penalties ranging from a misdemeanor to jail terms up to 4 years for child abuse.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. The Court of Appeal for the State of California has decided an important question of federal law which is in conflict with an applicable decision of this Court.

The recent case of Estelle v. Smith 451 U.S. 454, 101 S. Ct. 1866 (1981) held that a psychotherapist, appointed by the court, became an agent of the Court and was required to warn his patient that the communications made to him might be used against him.[2B/] That holding is equally applicable to the instant case. By requiring a practitioner to report to authorities these communications which would otherwise be considered confidential, and which relate to criminal activities, the state has made the practitioner its agent for the exercise of its authority. Just as the court-appointed psychotherapist in Estelle had a duty to warn this patient, so should the therapist in the

2B/ A fact completely overlooked and omitted by the Court of Appeal.

present situation because the mandatory nature of the reporting statute has made him an arm of the prosecution by requiring him to report "suspected incidents of child abuse."[3/] In doing this, the state must grant the patient the concommitant privilege guaranteed by the Fifth Amendment against being compelled to testify against himself.

2. This is an important issue of first impression with this Court - a logical extention of Estelle - and should be settled. This issue effects not only the citizens of California, but also the citizens of many other states which have similar "report-a-crime statutes." The issue raised herein strikes at the heart of the constitutional guarantee against self-incrimation, and would seem to require the type of warning established in Miranda. Without securing this type of constitutional guarantee, any

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3/ Section 11172 of the California Penal Code is set forth in Appendix at page A 21.

citizen who seeks medical assistance for any problem which may be the subject of the so-called "report-a-crime statute" will find himself or herself at the threshold of a jail cell instead of the security of a practitioner in the healing arts.[4/] This could not have been the intention of those who drafted our Constitution.

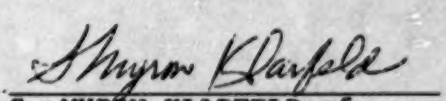
Boring its way through the center of this controversy is the policy consideration of whether it is better to maintain the confidentiality of the professional relationship so that those who need and seek help may be treated and cured, or is it better to trap the unsuspecting patient and send him off to jail?[5/]

4/ & 5/ The Court of Appeal clearly and carefully points out the seriousness of these compelling issues in its opinion on page A17 of the Appendix: "...(T)he strong public policy to protect children..." and "....the ramifications on psychological therapy if warnings are required...." Obviously, the Court of Appeal considered these policy considerations to be superior to the right against self-incrimination.

CONCLUSION

Based upon the foregoing, the Petitioner respectfully urges this Honorable Court to grant his Petition for a Writ of Certiorari.

Respectfully submitted,



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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

KENNETH FORBES,	)
	)4 Civil 27366
Plaintiff and Appellant,	)(Super. Ct. No.
	) 199833)
v.	)
	)O P I N I O N
ROBERT C. NEWMAN, II,	)
	)
Defendant and Respondent.	)
	)

APPEAL from the Superior Court of San Bernardino County. Don A. Turner, Judge. Reversed.

S. Myron Klarfeld for Plaintiff and Appellant.

Roberts & Morgan and Roger P. Martin for Defendant and Respondent.

THE COURT*

Plaintiff, Forbes, appeals from a judgment of dismissal entered after a demurrer had been sustained without leave to amend.

Before us is Forbes' third amended

*Morris, P.J., McDaniel, J., Trotter, J.

complaint. In 12 counts it sought general and punitive damages against Newman who was Forbes' psychologist. According to the complaint, Forbes voluntarily engaged in therapy with Newman commencing on April 2, 1979.

Forbes pleaded that on November 14, 1980, he learned for the first time that Newman had reported to a child protective agency that Forbes had a "vague sexual involvement" with his "daughter." A variety of damages were alleged to flow from this disclosure. Forbes pleaded he was tried and acquitted of criminal charges, lost custody of his children, was unable to work and so forth.

Newman takes the position that he has an absolute immunity to this civil action under the provisions of Penal Code sections 11165 through 11174 which require licensed psychologists, among others, to report instances of suspected child abuse learned

during the course of professional employment.

The two most basic questions raised on this appeal concern whether there is absolute immunity for Newman and whether Newman was under a duty to warn Forbes of the possibility arising that Newman would be required to report suspected instances of child abuse.

The first six causes of action are generally directed at negligent and intentional disclosure of confidential information to the authorities by Newman. The last six cause of action are built upon the concept that Newman had a duty to give Forbes warnings similar to Miranda warnings and that Newman breached that duty when he failed to warn Forbes of exceptions to the confidentiality of their relationship.[1/]

1/ The following are Forbes characterizations of the counts as they appear in the third amended complaint:

First: "Negligence - failing to act reasonably to maintain the confidentiality of the psychotherapist-client relationship."

Neither party attempts to justify or attack the specific elements of any one of the 12 causes of action. The complaint is obviously based upon creative pleading and we will not engage in an element by element and count by count review where the parties have not done so either here or before the trial court.

(Fn. 1 cont.)

Second: "Intentional Infliction of Emotional Distress - due to intentional breach of confidential relationship."
Third: "Invasion of Privacy - negligently failing to act reasonably."
Fourth: "Intentional Invasion of Privacy."
Fifth: "Violation of civil rights by failing to act reasonably."
Sixth: "Intentional Violation of Civil Rights."
Seventh: "Negligence due to Defendants failure to warn Plaintiff."
Eighth: "Intentional Infliction of Emotional Distress - based on intentional failure to warn."
Ninth: "Invasion of Privacy - failure to warn."
Tenth: "Intentional Invasion of Privacy - failure to warn."
Eleventh: "Violation of Civil Rights - failure to warn."
Twelfth: "Intentional Violation of Civil Rights - failure to warn."

Immunity rather than Forbes' creative causes of action is the focal dispositive point at this stage of the litigation. Basically it is Forbes' position that he successfully pleaded around any immunity bar. Forbes argues that the trial court determined a factual issue at the demurrer stage when it found absolute immunity. Forbes correctly argues that in order for the court to find immunity at this stage it impliedly concluded that Newman acted reasonably in making his report to the authorities. The first cause of action, for example, was a negligence count and included that Newman "unreasonably, without just cause and without right, reported . . . and wrongfully (characterized) said disclosure as a 'vague sexual involvement' . . ." The gist of the allegation was that Newman's disclosure was without legal justification. As we shall subsequently explain, Newman only has immunity where his disclosure is based upon reasonableness.

Newman argues that the complaint is inadequate because it does not plead enough specific facts to give him notice of the acts upon which his liability is allegedly based. Newman's brief recites: "The complaint . . . does not set forth those facts which (Newman) relied upon in reaching his conclusion to report the sexual involvement of (Forbes) with his stepdaughter. A cause of action must advise the defendant of the circumstances which give rise to unreasonable behavior." Newman cites no legal authorities on this general pleading question.

As we understand the complaint, it alleges that Newman made a child abuse report without an adequate basis for doing so. As we understand Newman's argument, he believes the complaint should set forth specific factual sections covering the disclosures made by Forbes upon which Newman relied. It is Newman, not Forbes, who possesses the knowl-

edge concerning what matters were relied upon in making the report.[2/] Without further explanation by Newman and the citation of supporting legal authorities it is unnecessary for us to further explore Newman's position on appeal. Forbes pleaded that the report was made and that it was done without justification and right. This adequately serves as notice to Newman. To delve further moves into the arena of discovery.

We now turn to the question of immunity. Penal Code Section 11166 requires licensed phychologists to report suspected instances of child abuse and Penal Code section 11172 provides for both civil and criminal immunity for doing so.

Penal Code section 11166, subdivision

2/ There are some flaws inherent in Newman's position. For instance, had Newman created the facts of child abuse from his own imagination rather than from his counseling with Forbes, what facts could Forbes set forth to satisfy Newman's position? What would Forbes plead if Newman's report was based upon expert professional evaluations rather than blunt disclosures by Forbes? Is Forbes prevented from getting beyond the pleading stage simply by not knowing exactly what Newman relied upon in arriving at his opinion? We think not.

(a), provides, in part: "(a) . . . any . . . medical practitioner . . . who has knowledge of . . . a child in his . . . professional capacity or within the scope of his . . . employment whom he . . . reasonably suspects has been the victim of child abuse shall report the . . . suspected instance of child abuse . . . ."(Emphasis added.) Similarly, Penal Code section 11166, subdivision (b), provides, in part: "(b) Any . . . medical practitioner . . . who reasonably suspects that mental suffering has been inflicted on a child or his . . . emotional well-being is endangered in any other way, may report such . . . suspected instance of child abuse . . . ." (Emphasis added.)

Penal Code section 11172 provides for immunity, as follows: "No . . . medical practitioner . . . who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any

other person reporting a . . . suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false . . . ." (Emphasis added.)

Immunity exists where the report is made because required or authorized by the reporting statute. Where a psychologist knows or reasonably suspects child abuse, he is immune from liability for making the report. In contrast, Forbes' complaint pleads that Newman's report was "without right" which imparts the meaning that it was beyond the immunity protection. Forbes pleaded that disclosure was "without just cause" which can impart the meaning that Newman lacked actual knowledge of child abuse. This latter matter is also established from the complaint by the fact Newman gained his knowledge from Forbes rather than the child. Newman's immunity would rest

on his reasonable suspicion of child abuse but the complaint adequately pleads around this by providing that the report was made "unreasonably" and "wrongfully."

If we assume that the current statutory language is applicable here, it grants immunity for a report "required or authorized" by the statutory scheme. In turn, section 11166 allows or demands reporting where the person reporting knows or "reasonably suspects" child abuse. According to the complaint, liability is based upon the secondary knowledge acquired through therapy and therefore brings into play the "reasonably suspects" portion of the statute.

The complaint alleged that the disclosure was unreasonable and wrongful. Section 11166 defines "reasonable suspicion" as "objectively reasonable for a person to entertain such a suspicion, based upon facts that could cause a reasonable person in a like position, drawing when appropriate on his or her training

and experience, to suspect child abuse."

Reasonableness is a question of fact arising from the complaint. Without resolution of this fact it cannot be determined that immunity applied here. Consequently, we agree that the court impliedly made a determination of fact in ruling on the demurrer.

While the language in the complaint may not be artful, it does avoid the bar of immunity on its face. We do not suggest that immunity may not exist, we only conclude that the complaint does not show the immunity bar on its face.

Forbes has argued that the current provisions of the child abuse reporting statutes are not the ones to be applied because the report predated the present sections. As we understand it, former Penal Code section 11161.6 was applicable at the time of the report. It provided, in part: "In any case in which a minor is brought to a . . . psychologist . . . and it appears to the

. . . psychologist . . . from observation of the minor that the minor has physical . . . injuries which appear to have been inflicted upon him by other than accidental means by any person, that the minor has been sexually molested, . . . he shall report . . . ."

The former statutory language on its face states that the minor had to be "brought to" the psychologist who had to make an "observation of" the minor in order to trigger the reporting statute. The reporting under the statute could not be the basis of civil or criminal liability "unless it can be proven that a false report was made and the person knew or should have known that the report was false." (Former Pen. Code, Section 11161.5.)

At the time Newman made the report, which was prior to November 14, 1980, actual observation of the child appears to be a requirement. As the complaint is drafted it is based upon a report derived on counseling with Forbes

rather than from observation of the child. Thus, the statutory immunity in effect at the time did not, on its face, show its application to Newman under the circumstances described in Forbes' complaint.

In enacting the present law and repealing former Penal Code section 11161.5, the Legislature specifically declared: "In reenacting the child abuse reporting law, it is the intent of the Legislature to clarify the duties and responsibilities of those who are required to report child abuse." From this Newman argues that the present law and the former law are the same. Despite the legislative declaration, it remains that the former statutory provision dealt with situations of actual observation of the victim. (See: Landeros v. Flood, 17 Cal. 3d 399, 407.)

In reviewing the former statute, the Supreme Court in Landeros stated, in essence, that a medical practitioner did not violate his reporting duties unless it could be proven that the doctor "actually observed" the in-

juries "and former the opinion they were intentionally inflicted . . ." (At p. 415.)[3/]

Whether present and former law are the same or different is of no consequence to our resolution. The briefing on this appeal is inadequate to resolve the very serious question of immunity under the former law, particularly on a review at the pleading stage. Because the complaint is adequately pleaded to avoid the immunity bar under present statutory law, we need not resolve the scope of the statutory law as it existed at the time of the report. If and when the parties must again face that question, we trust that they will go beyond the face of the statute and the

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3/ The medical practitioner is in a difficult position. If he fails to report he may be criminally prosecuted (Pen. Code, Section 11172, subd. (a)) and sued by the victim (Landeros v. Flood, supra). If he reports he then faces the initiation of the type of lawsuit before us. While immunity may ultimately attach, it can be an expensive venture in getting to that point.

general intent language of the Legislature.

We think it best to comment on Forbes' last six cause of action. Forbes contends that Newman had a duty to warn Forbes that communications between them might be reported to authorities and might result in criminal proceedings against Forbes. Forbes contends that Newman was required to observe all the constitutional safeguards which must be observed by law enforcement officials. Forbes says his psychologist was an agent of the state because state law requires the psychologist to report instances of child abuse learned in the confidential relationship with the patient.

Forbes' sole case authority for a duty to warn is Estelle v. Smith, 451 U.S. 454 (68 L.Ed.2d 359, 101 S.Ct. 1866). Estelle concerned a psychiatric evaluation of a defendant charged with murder to determine whether he was competent to stand trial. The

prosecution was directed by the court to arrange the examination and no notice was given to defense counsel. Subsequently, the psychiatrist, based on the competency examination, testified against defendant at the penalty phase of trial. That testimony substantially supplied necessary evidence for imposition of the death penalty.

The United States Supreme Court found both Fifth and Sixth Amendment violations. For instance, the defendant was not given Miranda warnings at the inception of the psychiatric interview. Estelle concerns the rights of an accused who has been charged with a crime and is represented by counsel. It deals with the admissibility of evidence against the accused in criminal proceedings.

Estelle does not begin to approach the circumstances before us. It is inapposite. Forbes also generally refers to the existence of Evidence Code sections 1010 through 1014. These sections set forth the psychotherapist-

patient privilege. Forbes does not explore these code sections nor does he interrelate them to the statutory requirement of disclosing cases of child abuse.

Forbes does not consider whether suppression of evidence in a criminal proceeding might be a complete remedy, assuming a duty to warn existed in the first instance. Forbes does not consider the applicability in civil proceedings of rules developed and used in criminal prosecutions. Forbes does not consider the interrelationship of his general position with the strong public policy to protect children from abuse. Forbes does not consider the effect of the fact that his relationship with Newman was a voluntary one. He does not consider the ramifications on psychological therapy if warnings are required before the commencement of all therapeutical sessions.

Forbes has failed to present adequate briefing to shoulder his burden as an appellant to demonstrate the trial court erred.

He has not demonstrated that there is a duty to warn under the circumstances here nor has he demonstrated the existence of a civil cause of action based upon a failure to warn.

We reverse the judgment of dismissal of the first six counts because none were pleaded in a manner which affirmativly demonstrated the immunity bar on their face. The remaining counts have not been shown to have a legal foundation.

The trial court is directed to vacate its order sustaining Newman's demurrer without leave to amend as to the first six causes of action only. The judgment of dismissal is reversed.

(Not to be published in official reports)

SUPREME COURT

FILED

October 27, 1982

Laurence P. Gill,
Clerk

ORDER DENYING HEARING

AFTER JUDGMENT BY THE COURT OF APPEAL

4th District, Division 2, Civil No. 27366

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

FORBES

v.

NEWMAN II

Appellant's petition for hearing DENIED.

The request for an order directing publication of the opinion in the above entitled cause is DENIED.

BIRD
Chief Justice

SECTION 11166, CALIFORNIA PENAL CODE
(In Pertinent Part)

"(a) Except as provided in subdivision (b), any child care custodian, medical practitioner, nonmedical practioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment whom he or she knows or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information concerning the incident. For the purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain such a suspicion, based upon the facts that could cause a reasonable person in a like position,

drawing when appropriate on his or her training and experience, to suspect child abuse.

(b) Any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or who reasonably suspects that mental suffering has been inflicted on a child or his or her emotional well-being is endangered in any other way, may report such known or suspected instance of child abuse to a child protective agency."

SECTION 11172, CALIFORNIA PENAL CODE

"(a) No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result

of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false. No person required to make a report pursuant to this article, nor any person taking photographs at his or her direction, shall incur any civil or criminal liability for taking photographs of a suspected victim of child abuse, or causing photographs to be taken of a suspected victim of child abuse, without parental consent, or for disseminating the photographs with the reports required by this article. However, the provisions of this section shall not be construed to grant immunity from such liability with respect to any other use of the photographs.

(b) Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty

of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than five hundred dollars ($500)or by both."

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No. 82-1227

IN THE

Supreme Court of the United States

October Term, 1982

KENNETH FORBES,

Petitioner,

vs.

ROBERT C. NEWMAN, II,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Questions Presented.

1. May Petitioner seek review of a purported federal question in a state court matter where (a) a demurrer to the Petitioner's complaint has been substantially overruled and further proceedings in the trial court are contemplated; and (b) the purported federal question does not otherwise qualify as a "final" judgment for purposes of this Court's jurisdiction under 28 U.S.C. § 1257?

2. Should *Miranda v. Arizona* (1966) 384 U.S. 436 be extended to require a private psychotherapist to give *Miranda* warnings to his patients before beginning private treatment sessions in a non-custodial, non-interrogatory setting?

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No. 82-1227

IN THE

Supreme Court of the United States

October Term, 1982

KENNETH FORBES,

Petitioner,

vs.

ROBERT C. NEWMAN, II,

Respondent.

Respondent Robert C. Newman, II hereby opposes the Petition for Writ of Certiorari of Kenneth Forbes seeking review of the opinion of the California Court of Appeal. That opinion is unreported and is reproduced in the Appendix to Forbes' Petition.

Summary of Argument.

The Statement of the Case in Forbes' Petition is generally accurate. However, it should be noted that the decision of the California Court of Appeal overruled a demurrer to and remanded for trial six causes of action for negligence, intentional infliction of emotional distress, invasion of Forbes' state and federal constitutional right of privacy, and violation of Forbes' state and federal civil rights. The operative complaint is reproduced as Appendix A to this Brief.

By his Petition, Forbes has asked this Court to extend the *Miranda* doctrine to require a private psychotherapist to give *Miranda* warnings to his patients in anticipation of statements they might make during therapy which the psychotherapist would be obliged by statute to report to the

authorities. Forbes' Petition should be denied because (1) the issue Forbes now raises lacks finality for purposes of 28 U.S.C. § 1257; and (2) there is no justification for extending the "custodial interrogation" rationale of *Miranda* to every interaction between psychotherapist and patient since the patient is in no sense "in custody" and, therefore, is subject to none of the coercive effects which motivated *Miranda's* warning requirements.

REASONS FOR DENYING THE WRIT.

A. THE PURPORTED FEDERAL ISSUE PRESENTED IN THIS COURT IS NOT FINAL FOR PURPOSES OF 28 U.S.C. § 1257. AS A CONSEQUENCE, FORBES' PETITION IS JURISDICTIONALLY DEFECTIVE.

In general, a state court judgment that contemplates further proceedings on remand is not final for purposes of this Court's jurisdiction under 28 U.S.C. § 1257. (*E.g., Flynt v. Ohio* (1981) 451 U.S. 619, 620-621.) In particular, "the overruling of a demurrer . . . is not [ordinarily] a 'final' judgment." (*Pope v. Atlantic Coast Line R. Co.* (1953) 345 U.S. 379, 382.)

There are, of course, exceptions to this rule: "In *Cox Broadcasting Corp. v. Cohn* [1975] 420 U.S. 469 . . . this Court identified four categories of cases in which a state court's decision of a federal issue had been treated as a final judgment even though additional proceedings in the state trial court were anticipated." (*Minnick v. California Dept. of Corrections* (1981) 452 U.S. 105, 121.) Briefly, those categories are: (1) cases where the federal question is dispositive of the litigation; (2) cases where the federal question will survive further litigation regardless of the outcome; (3) cases where later review of the federal question is precluded; and (4) cases where failure to immediately review the federal question would seriously impair an important federal policy. (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 479-483.)

As explained herein *infra*, the decision below does not fall within any of these categories and, as a result, Forbes' Petition is jurisdictionally defective.

1. The Purported Federal Issue Is Not Dispositive of the Litigation.

Even if Forbes is permitted by this Court to pursue the claims founded upon his "duty to warn" theory, the decision below guarantees him the right to proceed to trial on

six alternative causes of action, any one of which could afford him complete relief. As a result, this is not a case within the first category of exceptions to the finality rule where "there are further proceedings — even entire trials — yet to occur in the state courts but where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 479.)

2. The Purported Federal Issue Will Not Necessarily Survive Further State Court Proceedings.

Each cause of action in which Forbes asserts a violation of his constitutional rights invokes the California as well as the federal constitution. Therefore, the ultimate decision of this case could easily rest upon an adequate and independent non-federal ground as to which this Court will not take jurisdiction. (*E.g., Zacchini v. Scripps-Howard Broadcasting Co.* (1977) 433 U.S. 562, 568; *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 129.) Similarly, the six causes of action reinstated by the decision below raise several additional potential federal questions (*e.g.*, invasion of privacy, violation of federal civil rights statutes) which may be dispositive of the litigation and, in any event, call for abstention by this Court until the entire litigation is concluded. (*E.g., Republic Natural Gas Co. v. Oklahoma* (1948) 334 U.S. 62, 71-72.) In short, this is not a case within the second category of exceptions to the finality rule where "the federal issue . . . will survive and require decision regardless of the outcome of further state court proceedings." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 480.)

3. Later Review of the Purported Federal Issue Will Not Be Precluded by Further Proceedings on the Remaining Issues.

In the event that Forbes does not prevail on his remaining six causes of action he may seek further review in this Court. Review at that time of the purported federal issue raised herein will not be precluded even if the California Supreme Court refuses in the second appeal to consider the purported federal issues decided on the first appeal. (*E.g., Reece v. Georgia* (1956) 350 U.S. 85, 87; *Urie v. Thompson* (1949) 337 U.S. 163, 172-173.) In short, this is not a case within the third category of exceptions to the finality rule where "later review of the federal issue cannot be had, whatever the ultimate outcome of the case." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 481.)

4. There Is No Federal Policy Which Would Be Frustrated by a Refusal to Review the Purported Federal Issue Before Trial on the Remaining Issues.

As explained below in greater detail, there is no federal policy of which we are aware requiring *Miranda* warnings in a non-custodial environment not involving any interrogation. This case, therefore, does not fall within the fourth exception to the finality rule where "a refusal immediately to review the state court decision might seriously erode federal policy. . . ." (*Cox Broadcasting Corp. v. Cohn, supra*, 420 U.S. at 483.) As explained in *Flynt v. Ohio, supra*, 451 U.S. at 622:

> "The resolution of this question can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth exception to swallow the rule. Any federal issue finally decided on an interlocutory appeal in the state courts would qualify for immediate review."

B. THERE IS NO JUSTIFICATION FOR REQUIRING A PRIVATE PSYCHOTHERAPIST TO GIVE MIRANDA WARNINGS TO HIS PATIENTS.

The gravamen of Forbes' Petition is that because medical practitioners, such as Dr. Newman, have a duty under California law to report known or reasonably suspected instances of child abuse to an appropriate child protective agency, persons under the care of such practitioners are entitled to *Miranda* warnings in advance of their treatment. Forbes' only citation in support of this novel theory is this Court's decision in *Estelle v. Smith* (1981) 451 U.S. 454. In *Estelle*, this Court concluded, *inter alia*, that "when faced *while in custody* with a *court-ordered* psychiatric inquiry, respondent's statements to [a psychiatrist] were not 'given freely and voluntarily without any compelling influences' . . ." in the absence of *Miranda* warnings prior to the psychiatric interview. (451 U.S. at 469; emphasis added.) *Estelle* thus requires only that "*custodial interrogation* by a *court-appointed* psychiatrist must be treated the same as a custodial interrogation by a police officer or prosecuting attorney for the purpose of determining the applicability of *Miranda*." (*Battie v. Estelle* (5th Cir. 1981) 655 F.2d 692, 698 (citation omitted; emphasis added).)

That the holding in *Estelle* is inapplicable to the case at bar is apparent. Forbes does not and could not allege either that he was in custody at the time he revealed what Dr. Newman suspected to be an instance of child abuse or that the statements he made in the private, voluntary psychotherapy session between himself and Dr. Newman were in any way the product of a "custodial interrogation." There is, therefore, no basis upon which to invoke the *Miranda* doctrine.

See, *e.g.*:

State of Rhode Island v. Innis (1980) 446 U.S. 291, 301 ["the Miranda safeguards were designed to vest a *suspect in custody* with an added measure of *protection against coercive police practices* . . . ." (emphasis added)];

Beckwith v. United States (1976) 425 U.S. 341, 346 ["*Miranda* was grounded squarely in the Court's explicit and detailed assessment of the peculiar 'nature and setting of . . . in-custody interrogation,' " (citation omitted)];

United States v. Mueller (5th Cir. 1975) 510 F.2d 1116, 1117-18 ["The fallacy of this argument is that the appellant was not in custody at the time he admitted the wrongdoing. . . . [T]he admissions emerged during the course of an 'informal conversation.' The investigating agent was not a police officer and had no authority to arrest. Mueller was at liberty to depart at any time or to withhold whatever information he desired."].

The California Court of Appeal has squarely addressed the issue presented by Forbes' Petition and reached the same conclusion with respect to statements made to a physician in a hospital emergency room. In *People v. Salinas* (1982) 131 Cal.App.3d 925, 182 Cal.Rptr. 683, the court noted that if *Miranda* were extended to the host of medical practitioners and other social welfare workers covered by California's child-abuse reporting statutes, the rationale underlying *Miranda* would be distorted beyond recognition:

"The second policy consideration is that the old and new reporting statutes require a broad spectrum of people (from social workers and summer day camp

administrators to physicians and dental hygienists)[*] to report child abuse to the named agencies. If we were to require Dr. Carroll to give *Miranda* warnings in this case, then we would be compelled to hold the other people specified above to be police agents under the statute. *Miranda* would be extended far beyond whence it came, *i.e.*, custodial interrogation by the police." (131 Cal.App.3d at 942; 182 Cal.Rptr. at 692-693.)

Conclusion.

For the reasons stated herein, the Petition for Writ of Certiorari of Kenneth Forbes should be denied.

Respectfully submitted,

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JAMES C. PACKER,
HORVITZ & GREINES,
ELLIS J. HORVITZ,
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*See California Penal Code sections 11165(h), (i), and (j) reproduced as Appendix B to this Brief.

EXHIBIT A.

Third Amended Complaint for Damages.

Superior Court of the State of California for the County of San Bernardino.

Kenneth Forbes, an individual, Plaintiff, vs. Robert C. Newman, II, an individual; and Does 1 through 10 inclusive, Defendants. Case No. 199833.

THIRD AMENDED COMPLAINT FOR DAMAGES.

1. Negligence;
2. Intentional Infliction of Emotional Distress;
3. Invasion of Privacy;
4. Civil Rights.

SUMMONS ISSUED

Plaintiff, KENNETH FORBES, alleges as follows:

FIRST CAUSE OF ACTION

(Negligence — failing to act reasonably to maintain the confidentiality of the psychotherapist-client relationship)

1. Plaintiff is, and at all times material hereto was, a resident of the County of San Bernardino, State of California.

2. Defendant is, and at all times material hereto was, a resident of the County of San Bernardino and is a psychologist licensed by the State of California.

3. Plaintiff, KENNETH FORBES, is ignorant of the true names and capacities of Defendants sued herein as DOES 1 through 10, inclusive, and therefore sues these Defendants by such fictitious names. The Plaintiff will amend this Complaint to set forth their true names and capacities when the same have been ascertained. The Plaintiff is informed and believes, and thereon alleges, that each of said fictitiously named Defendants is negligent and responsible in some manner for the occurrences herein alleged

and that Plaintiff's damages as herein alleged were proximately caused by said negligence and conduct.

4. Plaintiff is informed and believes, and thereon alleges, that at all times herein mentioned, the Defendants, and each of them, were the agents and/or employees, coventurers, partners, or in some manner agents and/or principals for each other and acting within the course and scope of said agency and/or employment.

5. On or about April 2, 1979, Plaintiff engaged the fiduciary services of the Defendant for therapy and confidential counseling. Plaintiff, relying on the fiduciary relationship between himself and Defendant that all conversations with the Defendant would be held strictly confidential and privileged, made personal and confidential disclosures to the Defendant.

6. The Defendant, acting in his professional capacity, owed the Plaintiff a duty of care to act reasonably to maintain the confidential and fiduciary relationship between himself and Plaintiff.

7. On or about November 14, 1980, Plaintiff learned for the first time that the Defendant had negligently breached the aforesaid duty by failing to act reasonably to maintain the confidentiality of their relationship in that: (1) the Defendant unreasonably, without just cause and without right, reported to the Sheriff's Department of San Bernardino County and to the County Child Protective Services a confidential disclosure made to Defendant by the Plaintiff, and (2) by wrongfully characterizing said disclosure as a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Exhibit "A" attached.

8. As a direct and proximate result of the aforesaid negligent conduct of Defendant, Plaintiff was tried and acquitted in a criminal prosecution; had the custody of his

children wrongfully taken from him, suffered injury to his health, strength and activity, sustained severe shock, personal and public disgrace and humiliation, loss of family, friends and occupation, and injury to his nervous system, personal and mental processes, all of which injuries have caused and continue to cause Plaintiff great mental, physical and emotional distress and suffering and have resulted in permanent injuries and disability, all to his general damage.

9. As a further direct and proximate result of the aforesaid negligence of said Defendant, Plaintiff was put to great medical expense in connection therewith, the exact amount of such expenses is unknown to said Plaintiff at this time and he will ask leave of Court to prove same, and if required, to amend this Complaint to show the reasonable value thereof to the date of trial and in addition thereto, further additional medical expenses.

10. As a further and proximate result of the aforesaid negligence of the Defendant, the Plaintiff was prevented from attending to his usual occupations and thereby had loss of earnings in an amount presently unascertained. The Plaintiff is informed and believes, and on said information and belief, alleges that he will thereby be prevented from attending to said usual occupation for a period in the future which he cannot ascertain and will thereby sustain further loss of earnings, all to his damage.

SECOND CAUSE OF ACTION

(Intentional Infliction of Emotional Distress — due to intentional breach of confidential relationship)

11. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION, as if the same were separately set forth herein.

12. On or about November 14, 1980, Plaintiff learned for the first time that Defendant intentionally and fraudulently breached his duty to act reasonably to maintain the confidentiality of his relationship with Plaintiff by intentionally and wrongfully sending a letter to the Sheriff's Department of San Bernardino County and the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

13. Defendant fraudulently intended that Plaintiff make confidential disclosures in reliance on the confidentiality of their relationship; that Defendant's intentional and wrongful reporting aforesaid was malicious and fraudulent conduct intended to inflict emotional distress and to oppress the Plaintiff thereby entitling him to exemplary damages.

14. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

THIRD CAUSE OF ACTION

(Invasion of Privacy — negligently failing to act reasonably)

15. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 7, inclusive, of the FIRST CAUSE OF ACTION as if the same were separately set forth herein.

16. As a citizen not in the public light, Plaintiff has a right to privacy as guaranteed by the Constitutions of the United States and the State of California and the Defendant owed the Plaintiff the duty to act reasonably so as to protect this right of privacy, which Plaintiff never intended to surrender.

17. Defendant negligently breached his duty to act reasonably to maintain the confidentiality of his relationship with Plaintiff and to protect Plaintiff's right of privacy by wrongfully sending a letter to the Sheriff's Department of San Bernardino County and the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

18. Defendant knew that Plaintiff had made this disclosure in reliance on the confidentiality of the relationship between them, thus Defendant's reporting of Plaintiff's personal disclosures made in the course of therapy constitutes a negligent invasion of Plaintiff's right of privacy as guaranteed by the Constitutions of the United States of America and the State of California.

19. As a direct and proximate result of Defendant's negligent invasion of Plaintiff's privacy, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

FOURTH CAUSE OF ACTION

(Intentional Invasion of Privacy)

20. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 7, inclusive, of the FIRST CAUSE OF ACTION and Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION as if the same were separately set forth herein.

21. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to act reasonably to maintain the confidentiality of his relationship with the Plaintiff and to protect the Plaintiff's right of privacy when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County

and to the County Child Protection Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

22. Defendant knew that the Plaintiff had made his disclosure in reliance on the confidentiality of the relationship between them and knew that Plaintiff never intended to surrender this confidentiality and the Plaintiff's right to privacy; and further, Defendant's intentional conduct aforesaid in breaching the Plaintiff's right to privacy was malicious and fraudulent conduct intended to oppress the Plaintiff, thereby entitling him to exemplary damages.

23. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

FIFTH CAUSE OF ACTION

(Violation of civil rights by failing to act reasonably)

24. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION as if the same were separately set forth herein.

25. As a parent, Plaintiff's interest in the care, custody and companionship of his children is a fundamental civil right, guaranteed by the United States Constitution, the California Constitution and the Federal Civil Rights Acts.

26. Defendant owed the Plaintiff the duty to act reasonably so as not to violate the Plaintiff's civil rights.

27. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to act reasonably to protect Plaintiff's civil rights when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County and to the County

Child Protective Services containing the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

28. As the direct and proximate result of Defendant's negligent conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as specifically set forth herein.

SIXTH CAUSE OF ACTION

(Intentional Violation of Civil Rights)

29. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 6, inclusive, of the FIRST CAUSE OF ACTION and Paragraph 26, inclusive, of the FIFTH CAUSE OF ACTION, as if the same were separately set forth herein.

30. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to act reasonably to protect the Plaintiff's civil rights when Defendant wrongfully sent a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services with the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

31. Defendant knew that Plaintiff had made his disclosures in reliance on the confidentiality of the relationship between them and knew that Plaintiff never intended to surrender this confidentiality and the Plaintiff's civil rights; and further, Defendant's conduct aforesaid in intentionally violating Plaintiff's civil rights was malicious and fraudulent conduct intended to oppress the Plaintiff, thereby entitling him to exemplary damages.

32. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the dam-

ages set forth in Paragraphs 8, 9 and 10, inclusive of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

SEVENTH CAUSE OF ACTION

(Negligence due to Defendant's failure to warn Plaintiff)

33. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, as if the same were separately set forth herein.

34. The Defendant, acting in his professional capacity, owed Plaintiff a duty of care to warn the Plaintiff of any exceptions to the confidentiality of their psychotherapist/client relationship, including:

(1) a warning that Defendant could and would report any confidential disclosures to the authorities if the Defendant felt obliged to do so and that such disclosures could be used against him;

(2) a warning concerning the applicable law relating to such disclosures; and

(3) a warning that certain disclosures made by Plaintiff to Defendant could result in criminal and civil proceedings against the Plaintiff.

35. On or about November 14, 1980, Plaintiff learned for the first time that Defendant negligently breached his duty to warn Plaintiff, as set forth in Paragraph 34, by failing to so warn Plaintiff.

In addition, and because the Defendant failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff

disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

36. That as a direct and proximate result of Defendant's negligent conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10, inclusive, of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

EIGHTH CAUSE OF ACTION

(Intentional Infliction of Emotional Distress — based on intentional failure to warn)

37. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

38. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION, by intentionally failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to so warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied)

39. Defendant knew that Plaintiff had made his disclosures in reliance on the confidentiality of the relationship between them and also knew that if Defendant had warned the Plaintiff as described in Paragraph 34 of the SEVENTH

CAUSE OF ACTION that Plaintiff never would have made any disclosures of a confidential nature; that Defendant's intentional failure to warn and wrongful reporting aforesaid was malicious and fraudulent conduct intended to inflict emotional distress and to oppress the Plaintiff thereby entitling him to exemplary damages.

40. As the direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

NINTH CAUSE OF ACTION

(Invasion of Privacy — failure to warn)

41. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

42. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant negligently failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said

negligent failure to warn coupled with said reporting letter constituted an invasion of privacy of Plaintiff.

43. That as a direct and proximate result of Defendant's conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

TENTH CAUSE OF ACTION

(Intentional Invasion of Privacy — failure to warn)

44. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraph 16, inclusive, of the THIRD CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION as if the same were separately set forth herein.

45. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by intentionally failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to warn the Plaintiff aforesaid, Plaintiff made a disclosure to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosure Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff had disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said intentional failure to warn coupled with said reporting letter constituted an intentional invasion of privacy of Plaintiff.

46. Defendant's intentional failure to warn, wrongful reporting and intentional invasion of privacy aforesaid was

malicious and fraudulent conduct intended to oppress the Plaintiff thereby entitling him to exemplary damages.

47. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the damages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

ELEVENTH CAUSE OF ACTION

(Violation of Civil Rights — failure to warn)

48. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, Paragraphs 25 and 26, inclusive, of the FIFTH CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

49. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had negligently breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant negligently failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said negligent failure to warn coupled with said reporting letter constituted a negligent violation of Plaintiff's civil rights.

50. That as a direct and proximate result of Defendant's conduct aforesaid, Plaintiff sustained the damages set forth

in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

TWELFTH CAUSE OF ACTION

(Intentional Violation of Civil Rights — failure to warn)

51. Plaintiff, KENNETH FORBES, realleges the facts set forth in Paragraphs 1 through 5, inclusive, of the FIRST CAUSE OF ACTION, and Paragraphs 25 and 26, inclusive, of the FIFTH CAUSE OF ACTION, and Paragraph 34, inclusive, of the SEVENTH CAUSE OF ACTION, as if the same were separately set forth herein.

52. On or about November 14, 1980, Plaintiff learned for the first time that Defendant had intentionally breached his duty to give the Plaintiff the warnings set forth in Paragraph 34 of the SEVENTH CAUSE OF ACTION by negligently failing to so warn the Plaintiff.

In addition, and because the Defendant intentionally failed to warn the Plaintiff aforesaid, Plaintiff made certain disclosures to the Defendant, which he would not have otherwise done if he had been warned aforesaid, and which disclosures Defendant wrongfully reported in a letter to the Sheriff's Department of San Bernardino County and to the County Child Protective Services containing the wrongful statement that Plaintiff disclosed a "*vague* sexual involvement" with Plaintiff's daughter. (emphasis supplied) Said intentional failure to warn coupled with said reporting letter constituted an intentional violation of Plaintiff's civil rights.

53. Defendant's intentional failure to warn, wrongful reporting and intentional violation of civil rights aforesaid was malicious and fraudulent conduct intended to oppress the Plaintiff thereby entitling him to exemplary damages.

54. As a direct and proximate result of Defendant's intentional conduct aforesaid, Plaintiff sustained the dam-

ages set forth in Paragraphs 8, 9 and 10 of the FIRST CAUSE OF ACTION, which damages are realleged as if separately set forth herein.

WHEREFORE, Plaintiff prays for damages as follows:

On the FIRST, THIRD, FIFTH, SEVENTH, NINTH and ELEVENTH CAUSES OF ACTION:

1. For general damages according to proof.

On each CAUSE OF ACTION:

2. For costs of suit; and

3. For such further relief as the Court may determine.

On the SECOND, FOURTH, SIXTH, EIGHTH, TENTH AND TWELFTH CAUSES OF ACTION:

4. For exemplary damages in the sum of $1,000,000.00.

On each CAUSE OF ACTION:

5. For costs of suit; and

6. For such further relief as the Court may determine.

DATED: June 29, 1981

/s/ S. Myron Klarfeld
S. MYRON KLARFELD
Attorney for Plaintiff

EXHIBIT B.

California Penal Code.

§ 11165. Definitions.

As used in this article . . .

(h) "Child care custodian" means a teacher, administrative officer, supervisor of child welfare and attendance, or certificated pupil personnel employee of any public or private school; an administrator of a public or private day camp; a licensed day care worker; an administrator of a community care facility licensed to care for children; head-start teacher; a licensing worker or licensing evaluator; public assistance worker; employee of a child care institution including, but not limited to, foster parents, group home personnel and personnel of residential care facilities; a social worker or a probation officer.

(i) "Medical practitioner" means a physician and surgeon, psychiatrist, psychologist, dentist, resident, intern, podiatrist, chiropractor, licensed nurse, dental hygienist, or any other person who is currently licensed under Division 2 (commencing with Section 500) of the Business and Professions Code.

(j) "Nonmedical practitioner" means a state or county public health employee who treats a minor for venereal disease or any other condition; a coroner; a paramedic; a marriage, family, or child counselor; or a religious practitioner who diagnoses, examines, or treats children. . . .